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U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

SEP 26 2006

CLERK, U.S. DISTRICT COURT

By

Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NCR CORPORATION,
Plaintiff

v.

PEGASUS LOGISTICS GROUP, INC.,
Defendant.

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§

C. A. NO. **3-06 CV 1760M**
JURY DEMAND

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, NCR Corporation ("NCR"), Plaintiff in the above-entitled and numbered cause, complaining of Pegasus Logistics Group, Inc. ("Pegasus") hereafter called "Defendant" or "Pegasus" herein, and in support would show the Court as follows:

I.

Plaintiff, NCR Corporation ("NCR") is a Maryland corporation or similar entity, with a Texas certificate of authority, which was the shipper of the cargo in question, and brings this action on its own behalf, and on behalf of, and for, the interests of all parties who may be, or become, interested in the goods in question.

II.

Defendant, Pegasus Logistics Group, Inc. ("Pegasus"), was, and now is, a Texas corporation, or similar entity, with the power to sue and be sued, which regularly does business in Texas as a common carrier, freight forwarder and/or warehouseman of goods. Pegasus does maintain a registered agent in the state of Texas, and thus may be served through its registered

agent: Mr. Kenneth C. Beam, 615 Freeport Parkway, Suite 100, Coppell, Texas 75019, or in care of its President Mr. Kenneth Beam, at P.O. Box 370, Grapevine, Texas 76099.

III.

JURISDICTION

Plaintiff bases the jurisdiction of this Court on Surface Transportation Board Jurisdiction, 49 U.S.C. § 14706, et. seq., and the amount in controversy, which exceeds \$10,000.00 per load of freight carried, and/or diversity, 28 U.S.C. § 1332, and the fact that the loss in question exceeds \$75,000.00, and the pendent jurisdiction of this court.

IV.

VENUE

Venue applies in the Northern District of Texas – Dallas Division. Defendant is incorporated in Texas and has offices at 615 Freeport Parkway, Suite 100, Coppell, Texas 75019, and/or P. O. Box 370, Grapevine, Texas 76099, in the Northern District of Texas. Venue therefore applies in the Northern District of Texas, since it is a district through which Pegasus does business, 49 U.S.C. § 14706(d)(1).

V.

GENERAL

Whenever Plaintiff alleges that Defendant did any act or thing, it is meant that Defendant's officers, agents, servants, employees or representatives, did such act of thing, and that at the time such act of thing was done with the full authorization or ratification of Defendant, or were done in the normal and routine course and scope of employment of Defendant's officers, agents, servants, employees or representatives.

VI.

**ICC TERMINATION ACT OF 1995 COUNT,
AND FACTS FOR FOLLOWING COUNTS**

On or about November 17, 2005, Pegasus received, in Richmond, Virginia, in good order and condition, a cargo of one computer server to be shipped from Richmond, Virginia to Columbia, South Carolina. This cargo will hereafter be referred to herein as “cargo”, “computer”, or “goods.” Pegasus received the cargo in good order and condition with instructions to carry same from Virginia to South Carolina. Pegasus was supposed to carry, store and redeliver the cargo of one computer server, in good order and condition, to Columbia, South Carolina for Plaintiff, NCR Corporation.

Defendant, Pegasus undertook to carry the cargo to South Carolina, and maintain the cargo in the same good order and condition, as when delivered to Pegasus. Pegasus did not maintain the cargo in good order and condition during all of the carriage, and delivered it damaged in South Carolina. The cargo was found to be damaged during Pegasus’ carriage. The cargo was damaged due to the negligence of Pegasus during the carriage. The monetary loss incurred to Plaintiff’s as a result of the damaged delivery of the goods was \$87,238.00, for which Plaintiff demands recovery from Defendant.

VII.

NEGLIGENCE

Defendant Pegasus undertook duties as:

1. securement providers,
2. carriers,
3. handlers,
4. freight forwarders, and/or
5. warehousemen of the cargo.

The cargo was found to be damaged upon delivery due to Defendant, Pegasus's negligent:

1. securement,
2. dunnaging,
3. negligent instruction of others,
4. their negligent handling, carriage, securement and/or
5. defects in the trucks/trailers in which the cargo was carried.

VIII.

Defendant Pegasus were negligent as follows:

1. in failing to provide adequate securement methods,
2. negligent entrustment to third parties,
3. for failing to take adequate precautions to prevent damage during the carriage,
4. negligent entrustment of goods to third parties which were under-insured, and/or were ill-equipped for, or were under-informed concerning the securement of the cargo,
5. for negligent instruction of those they hired,
6. for failing to provide proper securement of the cargo during its carriage from Virginia to South Carolina, and/or
7. for carrying the cargo in a trailer which was defective, from a securement and cargo safety standpoint.

These acts and/or omissions constituted a breach of the duties of care owed by Defendant, Pegasus to Plaintiff, and/or proximately caused the loss, and/or damage in question.

IX.

RES IPSA LOQUITUR COUNT

Plaintiff further relies on the doctrine of res ipsa loquitur, as the computer server was damaged while within the care and/or custody of the Defendant, which, in the ordinary course of events, would not have occurred without negligence on the part of the Defendant, which negligence proximately caused the loss in question.

X.

CONTRACT BREACH

In the alternative, and without waiving the above causes of action, Defendant entered into a contract with the Plaintiff, or their agents, to carry, prepare for shipment, warehouse, provide securement for, and/or transport (in the complete quantity and in good condition) the cargo of one computer server from Virginia, to its planned destination, Columbia, South Carolina. Defendant is also liable for negligent instruction, and/or entrustment of the goods to third-parties and/or drivers, to whom they may have entrusted carriage, warehousing and/or securement responsibilities. Defendant failed to deliver all of the merchandise to the assigned destination, in Columbia, South Carolina, in the same condition and quantity as they received it. Defendant thus breached its contract of carriage, its bailment contract, its duties as carrier, freight forwarder, and/or securement provider, and its duties and obligations as a common carrier of goods, which breached proximately caused the loss in question.

XI.

In the alternative, Plaintiff claims that Defendant Pegasus had a contract with Plaintiff to properly carry the cargo and secure the cargo during carriage to South Carolina from Virginia. Plaintiff is a beneficiary to that contract. Pegasus violated the terms of its agreement with Plaintiff, or their agents:

1. for failing to provide reasonable, or adequate, securement, trailer equipment, and/or dunnaging for the computer server, and/or
2. for negligent instruction of subcontractors, which would have provided for: a) the cargo's securement, b) proper supervision, and/or instruction, of those entrusted with refrigeration responsibility, and/or c) safe carriage during its storage and movement from Virginia to South Carolina, and/or
3. Defendant Pegasus is liable for the defective, and/or deficient equipment utilized during the carriage and/or storage of the cargo of one computer server.

This negligence, and/or contract breach, led, or contributed to, the damage to the cargo in question.

XII.

BREACH OF BAILMENT OBLIGATIONS

In the alternative, and without waiving the above causes of action, Defendant was a carrier, warehouseman, and/or bailee, of Plaintiff's computer server, and had a duty to exercise the requisite care, and/or to insure that their hirelings exerted the requisite care: in providing proper securement and air ride equipment, and transporting, storing and/or forwarding for the NCR computer server in transit from Virginia to South Carolina.

XIII.

VIOLATION OF DUTY UNDER STANDARD OF CARE

Defendant Pegasus, failed to exercise the requisite care and protection of the cargo, failed to properly instruct others, and/or failed to safely deliver the one computer server to South Carolina, in the same condition as they received it. Defendant thus breached its duties as a

carrier, securement provider, cargo handler, warehouseman and/or bailee, which breach proximately, caused the loss in question.

XIV.

TRAILER DEFECT ALLEGATION

In the alternative, Plaintiff alleges that the trailer utilized by Defendant, Pegasus during the course of transit, was not an operative air-ride trailer. The trailer in which the computer server was damaged, also had certain inherent defects which led to the in question, for which Defendant is liable.

XV.

**AD DAMNUM CLAUSE AND CLAIM FOR
ATTORNEY'S FEES ON NON-ICC COUNTS**

As a direct result of the activities above, Plaintiff suffered losses in the amount of \$87,238.00, as nearly as same can now be estimated. Plaintiff retained the undersigned attorneys to present their claims to Defendant, and their claims have been presented to Defendant more than thirty (30) days ago. However, the claims have not been paid, although duly demanded. Therefore, pursuant to Chapter 38 of the Tex. Civ. Prac. & Rem. Code Ann., Plaintiff further seeks reasonable attorney's fees in the amount of \$28,000.00. Plaintiff further seeks all reasonable attorney's fees incurred in any future appeals. Plaintiff has performed all conditions precedent necessary to allow recovery.

XVI.

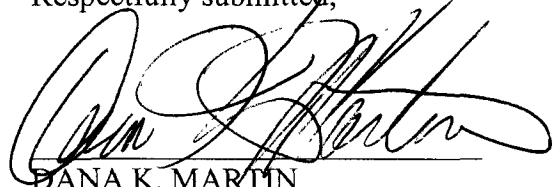
JURY DEMAND

Plaintiff requests trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court issue a summons to Defendant, Pegasus, requiring them to appear, and that this Court award judgment

to Plaintiff and against Defendant, including damages of \$87,238.00, reasonable attorney's fees of \$28,000.00, pre-judgment interest, post-judgment interest, costs of the court, all reasonable attorney's fees incurred in any future appeals, and such other and further relief to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dana K. Martin', is written over a horizontal line.

DANA K. MARTIN

SDTX I.D. No.: 126

Texas Bar No.: 13057830

712 Main Street, Suite 1515

Houston, Texas 77002

Telephone: (713) 222-1515

Direct Line: (713) 457-2287

Telefax: (713) 222-1359

Email: dmartin@hillrivkins.com

ATTORNEY IN CHARGE FOR
PLAINTIFF NCR CORPORATION

OF COUNSEL:

HILL RIVKINS & HAYDEN LLP

JS 44 (Rev. 1/00)

CIVIL COVER SHEET

The JS 44 Civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS NCR CORPORATION	DEFENDANTS PEGASUS LOGISTICS GROUP, INC.
(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.	
(c) Attorney's (Firm Name, Address, and Telephone Number) Dana K. Martin, Esq., Hill Rivkins & Hayden LLP 712 Street, Suite 1515, Houston, TX 77002	Attorneys (If Known)

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SEP 26 2006

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

3-06 CV 1760 M

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)		III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)			
<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)	Citizen of This State <input type="checkbox"/> 1	Citizen of Another State <input type="checkbox"/> 2	Citizen or Subject of a Foreign Country <input type="checkbox"/> 3	Incorporated or Principal Place of Business In This State <input type="checkbox"/> 4
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	Incorporated and Principal Place of Business In Another State <input type="checkbox"/> 5	Foreign Nation <input type="checkbox"/> 6		

IV. NATURE OF SUIT (Place an "X" in One Box Only)					
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input checked="" type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl Ret Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)					
<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation
					<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

VI. CAUSE OF ACTION Brief description of cause: 49 U.S.C. § 14706, 28 U.S.C § 1332, Breach of contract/carriage agreement

VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ 87,238.00	CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY	(See instructions): JUDGE	DOCKET NUMBER
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DATE 9/25/06 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____